No. 77-1576

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

JOHN VAL BROWNING,
*Petitioner,*

v.

UNITED STATES OF AMERICA

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Cases:

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals, filed in this case (No. 76-1958 in the court below) on March 14, 1978, reversing the order of the district court dismissing the indictment in the case.

## OPINIONS BELOW

The opinion of the court of appeals is not yet reported and is printed, along with the order denying a petition for rehearing, as Appendix A (pp. 1a-18a) to this petition.

The memorandum opinion of the district court dismissing the indictment is not reported and is printed as Appendix B (pp. 19a-25a) to this petition.

## JURISDICTION

The decision of the court of appeals (App. A, p. 1a) in this case was filed on March 14, 1978. A petition for rehearing, with a suggestion for rehearing en banc, was denied on April 5, 1978.

The jursidiction of this Court is invoked under the provision of 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that an investigation by the Bureau of Customs, which ultimately led to this indictment, was a "proceeding pending" before a department or agency within the meaning of 18 U.S.C. 1505, an obstruction of justice statute.

2. Whether the obstruction of justice provisions of 18 U.S.C. 1505 were intended to cover conversations between alleged accomplices to the commission of other federal offenses.

3. Whether the court of appeals lacked jurisdiction to consider the government's appeal from the district court's order dismissing the indictment, in view of the fact that the government deliberately filed its notice of appeal from the preliminary, oral order of dismissal, and never filed a notice of appeal from the final, written order of dismissal.



## STATUTES INVOLVED

18 U.S.C. 3731 provides in pertinent part:

* * * * *

"An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section."

* * * * *

"The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted."

18 U.S.C. 1503, 1505 and 1510 provide in pertinent part:

"§ 1503. Influencing or injuring officer, juror or witness generally.

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States magistrate or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate or other committing magistrate, in the

discharge of his duty, * * * * or corruptly or by threats or force, or by any threatening letter or communications, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

"§ 1505. Obstruction of proceedings before departments, agencies, and committees.

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

"Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending, therein; or

"Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in party with any civil investigation demand duly and properly made under the Antitrust Civil Process Act or section 1968 of this title willfully removes from any place, conceals, destroys, mutilates, alters, or by other means falsifies any documentary material which is the subject of such demand; or



"Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress——

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

"§ 1510. Obstruction of criminal investigations.

"(a) Whoever willfully endeavors by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigation; or

"Whoever injures any person in his person or property on account of the giving by such person or by any person of any such information to any criminal investigator–

"Shall be fined not more than $5,000, or imprisoned not more than five years, or both.

"(b) As used in this section, the term 'criminal investigator' means any individual duly authorized by a department, agency, or armed force of the

United States to conduct or engage in investigation of or prosecutions for violation of the criminal laws of the United States."

Rule 4. *Federal Rules of Appellate Procedure*

* * * * *

"(b) Appeals in Criminal Cases. In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest or judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment. When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice



of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision."

## STATEMENT OF THE CASE

Petitioner, who was at the time president of Browning, Inc., was indicted in March, 1976, along with that company and its subsidiary, The Browning Arms Company, in the Eastern District of Missouri, following a Bureau of Customs investigation which began in 1970.

The indictment (Appendix C, pp. 27a-42a) was in three counts. The first two charged agreements between the defendants and two foreign manufacturers associated with Browning in the production of sporting rifles, Fabrique Nationale (F.N.) in Belgium (Count I) and Miroku Firearms in Japan (Count II), to declare the invoice unit price of each gun as under $25.00 and not to disclose additional side payments which could be billed as "tooling" costs.

Each of those two counts goes on to allege that the defendants did "corruptly endeavor to influence, obstruct and impede the due and proper administration of the customs duties laws" by counseling, advising and suggesting to F.N. and Miroku, respectively, to give fraudulent and misleading answers to the Customs Service concerning "a matter material to the then pending investigation and inquiry," in violation of 18 U.S.C. 1505.

Since the conduct complained of in Counts I and II obviously does not violate 18 U.S.C. 1510 (obstruction of criminal investigations by "bribery, misrepresentation, intimidation, or force or threats thereof") the government resort-

ed to Section 1505 which is arguably broader as covering any "corrupt" endeavor, but which also, in pertinent part, speaks to obstruction of "the due and proper administration of the law *under which such proceeding is being had* before such department or agency." [Emphasis added.]

The indictment itself does not mention "proceeding" but alleges, in Counts I and II, obstruction of "the due and proper administration of the customs duties laws of the United States under which the United States Customs Service *was conducting said investigation and inquiry.*" (App., p. 34a)

Count III of the indictment alleges that the defendants did cause to be introduced into the Commerce of the United States certain sporting rifles by means of false statements and invoices on 26 specified dates beginning April 15, 1971, until November 15, 1972, in violation of 18 U.S.C. 542.

Following the return of the indictment, the case was transferred to the District of Utah "for the convenience of the parties and in the interest of justice."

Petitioner and the corporate defendants then filed motions to dismiss the indictment on several grounds, including the points raised by questions 1 and 2 of this petition.

After extensive briefing and two sessions of oral argument, the district judge, on August 16, 1976, orally ordered the indictment dismissed, but directed defense counsel to submit a proposed written order and the government to file its written objections thereto. The court's written order of dismissal (App. B) was filed on September 14, 1976.

The next day before receiving notice of the entry of the written order, the government filed a notice of appeal from the oral order entered on August 16, 1976. No notice of appeal was ever filed from the written order of September 14, 1976.



The court of appeals denied without opinion the motion of petitioner to dismiss the appeal for lack of jurisdiction which was based on the contention that the only notice of appeal filed was from the tentative oral order of August 15, 1976, and not the final order in the district court.

After briefing and oral argument, the court of appeals reversed the district court on all points on March 14, 1978.

In first discussing whether the Customs Service investigation into the importation practices of the Browning Arms Company was a "proceeding pending" with the meaning of 18 U.S.C. 1505, the court of appeals stated that the meaning of the term proceeding "is not so plain on its face as to lend itself to determination from the statute itself." (App. A, p. 6a).[1]

The court of appeals went on to say:

> "Some light was provided by Congress in its report dealing with the enactment of a clarifying section, now § 1510 of the same Chapter, 73. On that occasion Congress commented on § 1503 and § 1505 of the Chapter, stating that these sections 'presently prohibit attempts to influence, intimidate, impede or injure a witness or juror in a judicial proceeding, a proceeding before a Federal agency, or an inquiry or investigation by either House of the Congress or a congressional committee.' The Report continues with the statement that attempts to obstruct a criminal investigation

[1] The court of appeals disregarded the fact that when Congress, in enacting Section 1505, wanted to cover an investigation absent a "proceeding pending" it did so, in the third paragraph, in connection with the Antitrust Civil Process Act, and Section 1968 of Title 18, relating to racketeering investigations under supervision of the Attorney General pursuant to the provisions of that Section.

> or inquiry before a proceeding has been initiated are not within the contemplation of the mentioned sections. Stated differently, Congress said it was enacting § 1510 so as to supplement § 1503 to cover the protection of the witnesses at the pretrial stage of a criminal prosecution. The addition by Congress of §1510, which served to specifically define corruption of justice at the pretrial stage, does not serve to give any significant clarification to the meaning of 'proceeding' other than in the context dealt with. The decisions of the Circuit are less vague. The courts are generally inclined to hold that agency investigative activities are § 1505 'proceedings.'"

Accordingly, the court of appeals then relied principally on broad language from the Sixth Circuit in *United States v. Fruchtman*, 421 F.2d 1019 (1970), cert. den. 400 U.S. 849, where it was said that the term "proceeding" in Section 1505 was "broad 'encompassing both the investigative and adjudicative functions of a department or agency.' 421 F.2d at 1021." (App. A, p. 7a).[2]

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[2] Although the language in *Fruchtman* is broad, as stated by the court below, the government's brief in that case focused on the factual difference from what is presented here:

"Page 16:

> The Court below found the following characterisitics of Smeraldi's investigation to be relevant to its holding that it was a 'proceeding' protected by the criminal sanctions of 18 U.S.C. § 1505:
>
> > 'In accordance with the Rules of Practice, the Federal Trade Commission 16 C.F.R. Supp. Sec. 1.1 *et seq.*, the McLouth investigation of alleged discriminatory pricing practices of cold rolled steel was initiated upon the filing of an undisclosed complaint.'"

"Page 23:

> The only relevance this section [18 U.S.C.A. § 1510] would have to agency proceedings would be if the obstruction occurred by means of intimidating a complaining witness before he had made his complaint to the agency in a criminal matter. Once the complaint has been made, the obstruction is then of an agency proceeding and § 1505 has been construed to apply."



Noting that the Customs laws provide authority for Customs officers to cite persons to appear to testify under oath regarding imported merchandise (19 U.S.C. 1509), the court below pointed out that "[t]hese formal procedures are not reached in this investigation. At the same time, we do not see that the use of this machinery would have made the proceeding more like a 'proceeding' simply by virtue of the issuing of a subpoena formally or the giving notice of a preliminary investigation." (App., p. 8a).

In conclusion on the point, the court of appeals held that "the investigation or search for the true facts such as that which is described in the indictment here is not to be ruled as a non-proceeding simply because it is preliminary to indictment and trial." (App., p. 9a).

With respect to Count III of the indictment, which alleges 26 separate importations in a single count, the court below also reversed the district court because the court of appeals construed 18 U.S.C. 542 as a false statements statute and the 26 separate entries as being means of accomplishing the single offense alleged. (App., p. 12a-13a). The court went on to say: "Conceivably, however, the trial court would wish to compel the government to elect as to one transaction and prove the others as similar offenses or perhaps

some other procedure would be appropriate once the evidence is in." (Id.)

The district court had regarded as an "independent ground for dismissal" the prosecutorial misconduct of the government, at the time it answered in writing the motion to dismiss Count III, in threatening to "up the ante" if the defendants succeeded in their legal claim.

The government's opposition to the defendant's motion asserted that "if the defendants persist in this claim and the court agrees" the government would seek a new 26 Count indictment in St. Louis. "This," said the government's answer, "will raise the defendant's exposure from 12 years and/or $15,000.00 to 62 years and/or $140,000.00." (Government's Response to Corporate Defendants' Motion to Dismisss, page 7).

The court of appeals regarded this statement as not calling for a sanction.

## REASONS FOR GRANTING THE WRIT

This case involves a number of important issues concerning the jurisdiction of a court of appeals to entertain a defective appeal and the construction of an obstruction of justice statue which has broad public importance in the administration by federal agencies of their investigative functions. Each of the issues is of a sufficiently broad import in the administration of criminal justice to warrant review and determination by this Court.

1. Counts I and II of the indictment allege obstruction of "*the due and proper administration of the customs duties laws of the United States under which the United States*



*Customs Service was conducting said investigation and inquiry.*" (Emphasis added.) However, the statute used "*the due and proper administration of the law under which such proceeding is being had before such department or agency.*" (Emphasis added.) The statute does not speak to obstructive action during the conduct of department or agency "investigations or inquiries," absent the pendency of formal proceedings.

The district court dismissed those counts on the ground, *inter alia,* that the investigation alleged was not a "proceeding" within the meaning of the statute since it had been initiated without any complaint being filed, charge being made, or issuance of any formal process whatever.

The court of appeals reversed, holding that "the investigation or search for the true facts . . . is not to be ruled as a non-proceeding simply because it is preliminary to indictment and trial." (App. A, p. 9a).

The construction put on 18 U.S.C. 1505 by the court below compounds unduly broad language on the same subject by the Sixth Circuit in *United States v. Fruchtman, supra,* 421 F.2d 1019, although on the facts in *Fruchtman* the formality which would initiate a "proceeding" was indeed present.

As contended below by petitioner, the construction placed on the statute in this case by the court of appeals "would have the effect of making all of the acts of the Customs Service a 'proceeding'." (App. A, p. 6a).

The broad interpretation by the court of appeals gives wholly inadequate consideration to the clear intent and purpose of Congress, in 1967, in enacting 18 U.S.C. 1510 "to plug a loophole" in then existing law which included both 18 U.S.C. 1503 and 1505.

Section 1503 is the counterpart to 1505 and relates to obstruction in connection with judicial proceedings. A number of decisions made it clear that Section 1503 did not cover attempts to obstruct a criminal investigation before a proceeding (e.g., grand jury proceeding or the filing of a complaint) had been initiated. *United States v. Scoratow* (W.D. Pa., 1956), 137 F. Supp. 620; see *U. S. Code Congressional and Administrative News*, 90th Cong., 1st Sess., 1967, pp. 1769-1777.

As a consequence, Congress enacted 18 U.S.C. 1510 "to close a loophole in former laws." *United States v. San Martin* (C.A. 5, 1975), 515 F.2d 317.

The point has also been made by the Third Circuit in *United States v Kozak*, 438 F.2d 1062 (1971), at 1065:

> "The legislative history of § 1510 discloses that its purpose was to extend the protection of the preceding §§ 1503 and 1505 afforded witnesses, jurors and others in judicial, administrative and congressional proceedings to 'potential informants or witnesses' and to those who communicate information to Federal investigators prior to a case reaching the Court." (Footnotes omitted.)

The difference in applicability of 1505 or 1510 in this case is critical, in that Section 1510 is limited clearly to obstruction by "bribery, misrepresentation, intimidation, or force or threats thereof," none of which could be or is alleged as present here.

This is particularly relevant in view of the refusal by the court of appeals to accept petitioner's argument that the catch-all term "corruptly" in Section 1505 should be limited, under the rule of *ejusdem generis*, to embrace only acts



similar to intimidation, threats or force, or bribery, which are the specific types of conduct proscribed by the statute.

The court of appeals, in ruling as it has on the interpretation of Section 1505, has engaged in judicial legislation[3] and, moreover, the interpretation runs counter to the clear coverage afforded by Congress in enacting Section 1510 to cover this precise kind of investigation by an agency of the government.

The language of Section 1505 on its face is clear enough. Congress referred to both "proceedings" and "investigations" in the same section. They are clearly not used interchangeably.

When Congress in enacting Section 1505 wanted to cover an investigation absent a "proceeding pending" it did so, in the third paragraph, in connection with the Antitrust Civil Process Act, and Section 1968 of Title 18, relating to racketeering investigations under supervision of the Attorney General pursuant to the provisions of that Section.

What has unfortunately occurred over the years are some cases, relied on by the court below, which used overly broad language in construing the reach of Section 1505. But the facts in those cases show there was present in each the ele-

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[3] For example, the court of appeals here observed: "In sum, the term "proceeding" is not, as one might be inclined to believe, limited to something in the nature of a trial. The growth and expansion of agency activities have resulted in a meaning being given to 'proceeding' which is much more inclusive and which no longer limits itself to formal activities in a court of law. Rather, the investigation or search for the true facts such as that which is described in the indictment here is not to be ruled as a non-proceeding simply because it is preliminary to indictment and trial." (App. A, p. 9a).

ment of some formality initiating a proceeding, such as the filing of a complaint or the issuance of a subpoena.

As already noted, *United States v. Fruchtman, supra,* 421 F.2d 1019, involved a Federal Trade Commission proceeding which was commenced by the filing of a complaint with the Commission. *United States v. Batten,* 226 F. Supp. 492 (D.C.D.C., 1964), involved a proceeding commenced by a formal order of the Securities and Exchange Commission for the taking of testimony under oath and a subpoena for that purpose. *Rice v. United States,* 356 F.2d 709 (C.A. 8, 1966), involved a proceeding commenced by the filing of an unfair labor practice charge. As noted by the court below, although there was no formal complaint, preliminary charges had been presented to the National Labor Relations Board and "the filing of these gave notice to the subject of the charges." (App. A., p. 8a). *United States v. Vixie,* 532 F.2d 1277 (C.A. 9, 1976), involved a fraudulent response to an Internal Revenue Service subpoena.

Indeed, the Customs Service has statutory authority to commence similar proceedings, 19 U.S.C. 1509 and 1511, but it did not do so. As noted by the court of appeals, "[t]hese formal procedures are not reached in this investigation. At the same time," the court continued, "we do not see that the use of this machinery would have made the proceeding more like a 'proceeding' simply by virtue of the issuing of a subpoena formally or the giving of notice of a preliminary investigation." (App. A, p. 8a).

But that is essentially the difference between the applicability of 18 U.S.C. 1505 or 1510. The latter, not the former, protects "potential witnesses," as the court of appeals acknowledged in discussing *United States v. Carzoli,* 447 F.2d 774 (C.A. 7, 1971). (App. A, p. 8a).



The statute, Section 1505, is addressed to a *proceeding* "being had before" an agency; and thereby embraces a measure of formality in which parties are afforded procedural safeguards and due process.

The indictment, however, alleges only an *investigation* which, simply stated, cannot be equated with a "proceeding being had." In point of fact, Counts I and II of this indictment use the word "investigation" 13 times–and the word "proceeding" not at all.

In enacting Section 1510, Congress recognized the void in Sections 1503 and 1505 where investigations are concerned, and specifically legislated to fill that void. These are criminal statutes that should be strictly construed.

What has manifestly here occurred is that the government, having no facts to sustain an indictment under Section 1510 with respect to the Customs investigation, has improperly, without legal justification, reverted to Section 1505 which is inapplicable. Otherwise stated, being without facts to support an indictment under Section 1510, the government has wrongfully sought to expand the scope and purport of Section 1505.[4] Such prosecutorial pragmatism and judicial legislation should not be countenanced.

The treatment by the court of appeals of the scope of the pertinent statutory provisions totally obliterates the clear distinction between Section 1505 and Section 1510 and, if sustained, renders Section 1510 a legislative nullity.

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[4] Yet, the legislative history of Section 1510 shows that the Customs Service was named as one of the express beneficiaries of the then new coverage of that section. Congressman Rogers, a member of the Judiciary Committee, set forth a list of agencies, including the Customs Service, which would be aided by Section 1510. Cong. Rec. 90th Cong., 1st Sess., October 19, 1967, at pp. 2904-5.

The question here involved is of broad import in the administration of criminal justice and should be settled by this Court.

2. Part of the opinion of the court of appeals, disposing of one of petitioner's contentions below, appears to create a clear conflict in the circuits:

It is clear from the indictment that the alleged obstruction of justice set forth in Counts I and II assertedly lies in communication between Browning and officials of Fabrique Nationale (Count I) and of Miroku (Count II), who are alleged in the indictment to be effectively accomplices in communicating false information to Customs to violate the Customs laws.

The Fifth Circuit, in discussing 18 U.S.C. 1510, has held that the statute was "not intended to deal with communications between alleged accomplices to the commission of federal offenses." *United States v. Cameron* (1972), 460 F.2d 1394, 1401.

By parity of reasoning, the *Cameron* rule should apply to a Section 1505 violation. But this was rejected by the court below, in overruling the district judge on the point, in a single sentence: "The argument that the communications between accomplices cannot give rise to a violation is also lacking in merit." (App. A, p. 9a).

The result of the disposition of that issue by the court below is to add an obstruction of justice violation, with a possible 5 year imprisonment, to the false importation statute, 18 U.S.C. 542 (carrying only a 2 year penalty), whenever two persons agree to use a false invoice or statement concerning a Customs entry or furnish false data to a Customs investigator.



That may or may not be desirable as a matter of policy, but it should be decided by Congress, not the courts. The point has sufficiently broad implications to warrant consideration and resolution by this Court.

As a matter of law and common sense, communications between alleged accomplices in the course of an asserted violation of a federal customs statute cannot also be an obstruction of justice. The act of obstruction must be directed at a third party sought to be influenced in a subsequent inquiry of the alleged first violation. It does not relate to the alleged agreement of accomplices to commit the federal offense in the first instance, as particularly described in Count II of this indictment.

3. The court of appeals lacked jurisdiction to consider the government's appeal in this case because the government failed to comply with the requirement that the appeal be taken from the final order in the district court.

The district court issued a tentative oral order of dismissal on August 16, 1976, and directed counsel, respectively, to submit a proposed written order and objections thereto. On September 8, 1976, the government filed an abortive notice of appeal from that order in the court of appeals. Submissions were made by both sides to the district court concerning the proposed written order, and the final order was entered on September 14, 1976.

Without notice that the final order had been entered, the government filed a notice of appeal in the district court on September 15, 1976, from the oral order of August 16, 1976.

Despite the fact the government concedes it received notice of the entry of the final order on September 20, 1976, no notice of appeal from that order was ever filed.

Motions to dismiss the appeal on that ground were denied by the court of appeals without opinion.

However technical the point may appear, it is in fact jurisdictional. There was nothing inadvertent about the government's notice of appeal as filed, such as a typographical error as to the date.

It clearly intended to and was appealing from the oral order of August 16, 1976, and never filed a notice of appeal from the only final order in the district court.

Since the filing of a proper and timely notice of appeal is mandatory and jurisdictional, *United States v. Robinson* 361 U.S. 220, 224, and since the government failed to comply with the requirements of Rule 4(b), Federal Rules of Appellate Procedure, the court of appeals lacked jurisdiction to entertain the appeal. *United States v. Matthews* (C.A. 3, 1972), 462 F.2d 182, certiorari denied 409 U.S. 896; *United States v. Buckley* (C.A. 10, 1967), 382 F.2d 611.

In its reply to the motion to dismiss the appeal in the court of appeals, the government successfully urged that court to "reject appellees' formalistic and technical approach to pleading," arguing that petitioner was exalting form over substance. But as this Court said in *Carroll v. United States*, 354 U.S. 394, at 406, in rebuffing a similar argument by the government, "in a limited sense, form *is* substance with respect to ascertaining the existence of appellate jurisdiction."

Since in the federal concept, at least, appeals by the government in criminal cases have historically been viewed as "something unusual, exceptional, not favored," *Carroll, supra*, p. 400, the rule and its requirements should be literally construed against the government. The rule involved is clear and unambiguous. An appeal in order to lodge jurisdiction in a federal appellate court must be from a *final* order.



Because of the importance of the question to the proper and uniform administration of the Federal Rules of Appellate Procedure, this Court should review the matter on certiorari.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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## Appendix A

## UNITED STATES COURT OF APPEALS
## TENTH CIRCUIT

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Nos. 76-1956, 76-1957 and 76-1958

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UNITED STATES OF AMERICA,
*Plaintiff-Appellant,*

v.

BROWNING, INC., BROWNING ARMS COMPANY and JOHN VAL BROWNING,
*Defendants-Appellees.*

[Filed March 14, 1978]

Appeal from the United States District Court for the District of Utah, Central Division (D.C. Nos. CR-76-46-1, CR-76-46-2 and CR-76-46-3)

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Submitted: January 26, 1978

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David W. Harlan, Special Assistant United States Attorney (Ramon C. Child, United States Attorney, and David M. Rosen, Special Assistant United States Attorney, on the brief), for Plaintiff-Appellant.

Donald B. Holbrook of Jones, Waldo, Holbrook & McDonough, Salt Lake City, Utah (James S. Lowrie and Frederick P. McBrier of Jones, Waldo, Holbrook& McDonough, Salt Lake City, Utah; Of Counsel: John J. Sheehy of Rogers & Wells, New York, New York, and Dennis Donnelly of Bryan, Cave, McPheeters & McRoberts, St. Louis, Missouri, on the brief), for Defendants-Appellees Browning, Inc. and Browning Arms Company.

Edward P. Morgan of Welch & Morgan, Washington, D.C. (Kevin T. Maroney of Welch & Morgan, Washington, D.C., and Of Counsel: George N. Larsen, Salt Lake City, Utah, on the brief), for Defendant-Appellee John Val Browning.

Before McWILLIAMS, DOYLE and LOGAN, CIRCUIT JUDGES.

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DOYLE, Circuit Judge.

The judgment which we are asked to review and reverse in this case is one based upon the trial court's dismissal of an indictment charging Browning, Inc., Browning Arms Company and John Val Browning with carrying out a fraud on the government by persuading or influencing manufacturers in Belgium and Japan to misrepresent on invoices the sale prices of various firearms, thereby reducing the amount of import duties.

The original indictment was returned by a Federal Grand Jury in St. Louis. For reasons not here relevant, the case was transferred from the Eastern District of Missouri to the District of Utah. Extensive pretrial arguments and briefing resulted in the present dismissal.

Section 1505 is the pertinent statute, and particularly important is the meaning to be attributed to the term "in any proceeding pending":

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; . . .

Count I states, in extensive detail, background information as to the relationship of Browning Arms Company and a Belgian manufacturing company, the seller of the weapons



to Browning. It alleges that the scheme was originally entered into in 1965, and called for John Val Browning to persuade the FN* Company of Belgium to declare the invoice unit price of a certain rifle to be $24.95, notwithstanding that the actual price was more. Added compensation was given by Browning Arms Company to FN by means of side payments. Between 1965 and 1970, 57,000 rifles were sold with false selling prices and with an agent of Browning declaring that there existed no document or information showing a different price. The same allegations are stated as to another rifle, the so-called T-Bolt, T-2 .22 caliber rifle.

According to further allegations, the Customs Service conducted an investigation into the importation practices of the Browning Arms Company in the period 1970–75. Browning, during the investigation, counseled, advised and suggested that the Belgian corporation conceal the side payments and give misleading, incomplete and manufactured answers to inquiries of the United States Customs Service.

Count II differs only in that it involves differently described firearms and a Japanese manufacturer, but the identical actions and practices set forth in Count I are set forth in Count II.

The third count dealt with the introduction into United States commerce of imported rifles during 1971–72 by the use of false and fraudulent invoices, contrary to 18 U.S.C. § 542.[1]

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* Fabrique Nationale d'Arms de Guerre S.A., Liege, Belgium.

[1] This section provides:

> Whoever enters or introduces, or attempts to enter or introduce, into the Commerce of the United States any imported merchandise by means of any fraudulent or

The trial court dismissed the first two counts because, as it concluded, the Bureau of Customs investigation inquiry did not constitute a "proceeding" pending before a department or agency within the meaning of § 1505. An additional ground given by the trial court for the dismissal of the indictment was that the term "corruptly" coupled with the words "endeavors to influence, counsels, suggests and advises" did not define an offense, and, specifically, that § 1505 does not make it a crime to counsel, suggest and advise.

Count III was ruled to be duplicitous in that it alleged that there were 26 fraudulent importations evidenced by separate documents, all of which import transactions were set forth in a single count. This was determined to require dismissal.

The questions presented and which we consider are:

First, whether the customs investigation as to the accuracy of the price representations and the investigation pertaining to falsification of answers was within the scope of the term "*proceeding*" as the same is used in § 1505.

Second, whether the district court correctly ruled that § 1505 is not violated by a corrupt act such as that presented, namely to give advice or counsel to foreign manu-

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false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or applicance, or makes any false statement in any declaration without reasonable cause to believe the truth of such statement, or procures the making of any such false statement as to any matter material thereto without reasonable cause to believe the truch of such statement, whether or not the United States shall or may be deprived of any lawful duties; . . .



facturers that they are to falsify their answers to questions of Customs officials of the United States.

Third, whether the trial court ruled correctly in concluding that Counts I and II were so unclear as to make it impossible to determine which defendants committed which act.

A fourth question pertains to the third count only—in the false statement charged pursuant to 18 U.S.C. § 542. It describes 26 different occasions taking place during 1971–72 in which false statements were employed contrary to § 542. The ruling of the trial court was that the duplicitousness of this count called for its total dismissal.

## I
## WAS THE CUSTOMS INVESTIGATION OR INQUIRY A "PROCEEDING" AS THAT TERM IS USED IN § 1505?

In support of the government's contention that it was a "proceeding" in fact as well as in law, the indictment outlines the extensive, complex and comprehensive procedures before the Bureau of Customs. A foreign producer sending goods into the United States must complete a "Special Customs Invoice," which states the true price and value of the goods. Also, the domestic importer must complete either a "Customs Consumption Entry" or a "Customs Warehouse Entry" before it removes the goods from the custody of the Customs Service. The domestic importers must certify that the Special Customs Invoice is accurate. The Customs Service must evaluate the goods so as to assess the proper duty to be imposed, and it uses the documents which are furnished to it, which purport to contain the price, in reaching its conclusion. This all precedes any criminal study or inquiry.

The indictment alleged that between December 1970, and August 1975, the District Director of Customs Service at St. Louis conducted an investigation into the practices of the Browning Arms Company and that the individual defendant Browning, as agent for the corporate defendants, counseled, advised and suggested that the two foreign companies, the Japanese company and the Belgian company, were to give false answers when questioned by Customs officers.

The government's theory is that the "proceeding" commenced when the importer submitted an Entry Form and the Customs Service started the process of evaluating the goods.

The thesis of the defendants, on the other hand, is that the meaning advocated by the government is far too broad. To so construe it would have the effect of making all of the acts of the Customs Service a "proceeding."

The question before us as to the present meaning of the term "proceeding" is not so plain on its face as to lend itself to determination from the statute itself. Therefore, the cases and available background sources must be looked to.

Some light was provided by Congress in its report dealing with the enactment of a clarifying section, now § 1510 of the same Chapter, 73. On that occasion Congress commented on § 1503 and § 1505 of the Chapter, stating that these sections "presently prohibit attempts to influence, intimidate, impede or injure a witness or juror in a judicial proceeding, a proceeding before a Federal agency, or an inquiry or investigation by either House of the Congress or a congressional committee." The Report continues with the statement that attempts to obstruct a criminal investigation or inquiry before a proceeding has been initiated are not within the contemplation of the mentioned sections.



Stated differently, Congress said it was enacting § 1510 so as to supplement § 1503 to cover the protection of witnesses at the pretrial stage of a criminal prosecution. The addition by Congress of § 1510, which served to specifically define corruption of justice at the pretrial stage, does not serve to give any significant clarification to the meaning of "proceeding" other than in the context dealt with. The decisions of the Circuit are less vague. The courts are generally inclined to hold that agency investigative activities are § 1505 "proceedings." The government argues that § 1505 supplements the new provision, § 1510, by protecting against corruption at every stage. In this connection, we note that the District Director is authorized by regulation, 19 C.F.R. § 173.6 (1977), to conduct reviews of entries in submitted documents with a view to searching out and uncovering fraud. This process was carried out in the case at bar, and it led to a criminal indictment.

A strong authority dealing with the specific question whether a false invoice investigation is a "proceeding" is found in United States v. Fruchtman, 421 F.2d 1019 (6th Cir.), *cert. denied*, 400 U.S. 849 (1970). There a conviction under the statute with which we are here dealing, § 1505, was upheld. It was predicated on evidence similar to ours, the giving of false invoices to a F.T.C. investigator. The court ruled that the term "proceedings" was broad "encompassing both the investigative and adjudicative functions of a department or agency." 421 F.2d at 1021.

An Eighth Circuit decision in which there had been no formal complaint filed was Rice v. United States, 356 F.2d 709 (8th Cir. 1966). In that case a charge of violating § 1505 by intimidating witnesses in an NLRB investigation was upheld. The court noted that no formal complaint had been filed, but said that "proceedings" were not limited

to "only those acts committed after a formal stage was reached." There had been, however, preliminary charges presented to the Board, and the filing of these gave notice to the subject of the charges and that there was a field investigation being made to determine whether or not the Board would file a complaint. The court said that these initiated the investigatory "proceedings." Similarly, in our case, the District Director of Customs conducted an initial or preliminary evaluation proceeding which was a prelude to a criminal investigation.

The activities before the Customs Commission are not unlike those which are pursued by the Internal Revenue Service or the Immigration and Naturalization Service. In United States v. Carzoli, 447 F.2d 774 (7th Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972), the Seventh Circuit upheld a conviction for obstructing an Internal Revenue Service investigation into possible criminal activity. This was under § 1510. The court noted that that statute was designed to protect potential witnesses.

Another case, one from the Ninth Circuit, United States v. Vixie, 532 F.2d 1277 (9th Cir. 1976), involved a fraudulent response to an I.R.S. subpoena which was issued in the course of administrative proceedings.

It is to be noted that 19 U.S.C. § 1509 provides for Customs officers to cite importers and others to appear to testify under oath regarding imported merchandise. These formal procedures are not reached in this investigation. At the same time, we do not see that the use of this machinery would have made the proceeding more like a "proceeding" simply by virtue of the issuing of a subpoena formally or the giving notice of a preliminary investigation.

United States v. Batten, 226 F. Supp. 492 (D.D.C. 1964), *cert. denied*, 380 U.S. 912 (1965), involved an S.E.C. investigation which was determined to have been a "proceeding." However, the S.E.C. has more of a tribunal character than does many other administrative agencies.



One more comment: *Carzoli* and *Vixie* show that there is some overlap between § 1505 and § 1510, with § 1505 being recognized as having much more breadth applying as it does to the protection against corruption incident to the proper administration of the law.

In sum, the term "proceeding" is not, as one might be inclined to believe, limited to something in the nature of a trial. The growth and expansion of agency activities have resulted in a meaning being given to "proceeding" which is much more inclusive and which no longer limits itself to formal activities in a court of law. Rather, the investigation or search for the true facts such as that which is described in the indictment here is not to be ruled as a non-proceeding simply because it is preliminary to indictment and trial.

We conclude that it was error for the trial court to determine that the Customs officials were not involved in a proceeding and in concluding that Counts I and II should be dismissed.

We have also considered the trial court's conclusion that the indictment confused the identity of the two corporate defendants resulting in a lack of clarity as to which of them was charged with which conduct, and we have considered the trial court's ruling that Counts I and II were duplicitous since they alleged that there were several years of fraudulent conduct which is said to be irrelevant and prejudicial. We see no merit in either of these rulings.

The argument that the communications between accomplices cannot give rise to a violation is also lacking in merit.

We have considered the question whether the district court correctly ruled that under § 1505 the giving of advice or counsel by the defendant to give false answers to investigators is a violation of § 1505, and we differ with the trial court's conclusion that such an allegation is insufficient. The statute prohibits obstruction of proceedings "corruptly or by threats or force." The district court interpreted the statute too narrowly when it determined that only "evil means" such as coercion and intimidation of witnesses could constitute a violation. The authorities are to the contrary. They hold that advising or procuring false testimony or statements comes within the prohibition of the obstruction of justice statutes. *See* United States v. Abrams, 427 F.2d 86 (3d Cir.), *cert. denied*, 400 U.S. 832 (1970)(§ 1505); Cole v. United States, 329 F.2d 437 (9th Cir. 1964), *cert. denied*, 377 U.S. 954 (1964) (§ 1503); Stein v. United States, 337 F.2d 14 (9th Cir. 1964). In United States v. Henderson, 386 F. Supp. 1048 (S.D.N.Y. 1974), the court said:

> Under sections 1503 and 1505 the word "corruptly" has been given a broad and all-inclusive meaning; both sections have been held to encompass obstruction in the absence of force or threats . . .
> 386 F. Supp. at 1055.



II
DID THE TRIAL COURT ERR
IN ITS HOLDING THAT COUNT II
HAD TO BE DISMISSED BECAUSE OF DUPLICITY?

The basis for the court's decision that the count was duplicitous was that it alleged a violation of 18 U.S.C. § 542 based on the fact that there were 26 different occasions on which imported rifles came into the United States with false statements and invoices. Is this necessarily duplicitous? We hold that it is not. Merely because an indictment alleges several means of accomplishing a single offense, rather than two separate offenses, in a single count, does not necessarily mean that it is duplicitous. United States v. Warner, 428 F.2d 730 (8th Cir.), *cert. denied*, 400 U.S. 930 (1970); Travis v. United States, 247 F.2d 130 (10th Cir.), *rev'd on other grounds*, 364 U.S. 631 (1957); 8 Moore's Federal Practice ¶8.03[2] (1977).

Does this allege several means of accomplishing a single offense? The government places reliance on the case of United States v. Cohen, 35 F.R.D. 227 (N.D. Cal. 1964), *aff'd*, 378 F.2d 751 (9th Cir.), *cert. denied*, 389 U.S. 897 (1967). In *Cohen*, the defendant had been accused of transmitting interstate wagering information while in the business of wagering, contrary to 18 U.S.C. § 1084(a). The indictment alleged up to 12 calls by two bettors over a period of about three months. The court held that this could have been regarded as a continuing course of conduct which it was to the defendant's advantage to have treated as only one offense, and on that basis determined that it was not duplicitous.

Granted, the *Cohen* decision is somewhat different in that the issue was whether the accused was in the business of wagering and the course of conduct was therefore an ele-

ment. In our case, § 542 prohibits false statements. Defendant cites and relies on United States v. Tanner, 471 F.2d 128 (7th Cir.), *cert. denied*, 409 U.S. 949 (1972), wherein the court held duplicitous an indictment which charged the defendants with transportation of explosives in interstate commerce between Tennessee and "diverse other places" over a four-month period. These were different trips by different defendants carrying different carloads of dynamite and were held to not be part of a continuing scheme to transport explosives in the absence of a broadly defined allegation as to the scheme. *Id.* at 139.

Other cases illustrate the distinctions which have been drawn between allegations of multiple offenses and of multiple means of carrying out one offense. *See* Geberding v. United States, 471 F.2d 55 (8th Cir. 1973) ("assaulting" and "putting in jeopardy" of victims in bank robbery only two means of committing one crime); United States v. Warner, 428 F.2d 730 (8th Cir.), *cert. denied*, 400 U.S. 930 (1970) (each count in indictment for aiding preparation of false tax return alleged several ways of committing a single misrepresentation on a single return – held not duplicitous; Travis v. United States, 247 F.2d 130 (10th Cir.), *rev'd on other grounds*, 364 U.S. 631 (1957) (charge of stating falsely in affidavit that defendant was not a member of Communist Party and that he was not affiliated therewith, stated two means of accomplishing one offense of false affidavit).

In our case, on each of the invoices, it is alleged that John Val Browning as an officer of the Browning Arms Company wrote to his Japanese manufacturer-seller, Miroku, and counseled that the invoices described in the indictment reflect the individual unit price or value less than the actual unit price or value of the merchandise. Accumulated



documents, if shown by the evidence to establish falsity and fraud, would succeed in doing so by reason of the number of times that it was practiced. Conceivably, however, the trial court would wish to compel the government to elect as to one transaction and prove the others as similar offenses or perhaps some other procedure would be appropriate once the evidence is in. We are unable, however, to understand the necessity for dismissal of the indictment on this account. *See* Reno v. United States, 317 F.2d 499 (5th Cir. 1963); United States v. Starks, 515 F.2d 112 (3d Cir. 1975), *aff'd*, Abney v. United States, 431 U.S. 651 (1977); 8 Moore's Federal Practice ¶8.04 (1970); 1 Wright, Federal Practice and Procedure, § 145 (1969).

The trial court was concerned about the fact that the prosecutors stated in open court that the treating of this as one transaction rather than 26 was in the defendant's best interest. This does not call for a sanction against the government.

We have also examined 19 U.S.C. § 1603, stating that it is the duty of the appropriate Customs officer to report such seizure or violation to the United States Attorney for the district. It does not appear, however, that it was a seizure in this case and that this provision would come into play. The reaction of the trial court to this matter was not well founded.

Our conclusions on the dismissal of Count III are, first that it was error to dismiss the count because of the listing of each of the several invoices. We have appended Count III in order to show that some question exists as to whether it sets forth distinct transactions.

Secondly, whether this is duplicitous should be considered by the trial court in the light of the evidence. If the court so determines, it can require the prosecution to make an election as to the single transaction which he wishes to rely on. The remaining items can then be considered as similar offenses to prove the element of the offense or be stricken if not considered relevant. If it is established by the evidence that the 26 invoices evidence one connected series of transactions, the matter can be so considered.

We have not considered in connection with this case the further request of the government that the trial court be removed from continued presiding over this trial. If the government wishes to pursue this, it should present its request in a separate petition which details the grounds for the request.

COUNT III

The Grand Jury further charges that:

On or about the dates hereinafter specified, in the Eastern District of Missouri,

BROWNING, INC.
THE BROWNING ARMS COMPANY
and JOHN VAL BROWNING,

the defendants herein, willfully and knowingly did enter and introduce and attempt to enter and introduce into the commerce of the United States, imported merchandise, that is, Browning BL-22, Grade I, .22 caliber rifles by means of false statements, false and fraudulent invoices, declarations, affidavits and certain other papers, to wit, Customs Warehouse Entries and Customs Consumption Entries, the said statements invoices, declaration, affidavits and papers being hereinafter described by "Entry Number" and "Date of Entry,"



which said documents were false and fraudulent in that they did reflect as the invoice unit price and value of said merchandise a price and value which was less than the actual unit price or value of said merchandise, as the defendants then knew.

| Entry Number | Date of Entry |
|---|---|
| 105729 | April 15, 1971 |
| 106190 | May 11, 1971 |
| 106350 | May 19, 1971 |
| 106387 | May 20, 1971 |
| 106906 | June 16, 1971 |
| 100851 | August 24, 1971 |
| 101308 | September 22, 1971 |
| 101538 | October 5, 1971 |
| 102219 | November 15, 1971 |
| 102299 | November 18, 1971 |
| 102300 | November 18, 1971 |
| 102430 | November 29, 1971 |
| 105088 | April 5, 1972 |
| 105167 | April 7, 1972 |
| 105461 | April 24, 1972 |
| 105591 | April 27, 1972 |
| 105932 | May 15, 1972 |
| 106589 | June 19, 1972 |
| 106694 | June 23, 1972 |
| 100102 | July 10, 1972 |
| 100738 | August 9, 1972 |
| 100886 | August 16, 1972 |
| 101329 | September 12, 1972 |
| 102948 | October 25, 1972 |
| 102159 | November 1, 1972 |
| 102426 | November 15, 1972 |

In violation of Section 542, Title 18, United States Code.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
OFFICE OF THE CLERK
469 United States Courthouse
Denver, Colorado 80294

Howard K. Phillips
Clerk

Telephone:
303-837-3157

April 5, 1978

Edward P. Morgan
Kevin T. Maroney
Welch & Morgan
300 Farragut Building
900 Seventeenth Street, N.W.
Washington, D.C. 20006

Re: Nos. 76-1956 through 76-1958
U.S.A. vs. Browning, Inc.

Dear Counsel:

Enclosed is a copy of an order entered today in the above captioned causes.

Very truly yours,

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

bje
Enclosures
cc: Ronald L. Rencher, U.S. Attorney, 200 United States Courthouse, Salt Lake City, Utah 84101
David W. Harlan, Special Assistant U.S. Attorney, 114 Market Street, Room 402, St. Louis, Missouri 63101
George N. Larsen, P.O. Box 844, 1120 Continental Bank Bldg., Salt Lake City, Utah 84110



Dennis C. Donnelly, 500 North Broadway, St. Louis, Missouri 63102
Donald B. Holbrook, James S. Lowrie, 800 Walker Bank Building, Salt Lake City, Utah 84111
Edward P. Morgan, Kevin T. Maroney, 300 Farragut Building, 900 Seventeenth Street, N.W., Washington, D.C. 20006
John Sheehy, 200 Park Avenue, New York, New York 10036

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MARCH TERM – April 5, 1978

Before The Honorable Oliver Seth, Circuit Judge
The Honorable William J. Holloway, Jr., Circuit Judge
The Honorable Robert H. McWilliams, Circuit Judge
The Honorable James E. Barrett, Circuit Judge
The Honorable William E. Doyle, Circuit Judge
The Honorable Monroe G. McKay, Circuit Judge
The Honorable James K. Logan, Circuit Judge

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff-Appellant, vs. BROWNING, INC., Defendant-Appellee. | ) | No. 76-1957 |
| UNITED STATES OF AMERICA, Plaintiff-Appellant, vs. BROWNING ARMS COMPANY, Defendant-Appellee. | ) | No. 76-1957 |

. . . . . )
)
UNITED STATES OF AMERICA, )
Plaintiff-Appellant, )
vs. ) No. 76-1958
)
JOHN VAL BROWNING, )
Defendant-Appellee. )

This matter comes on for consideration of the petition for rehearing with suggestion for rehearing en banc filed by appellees.

Upon consideration whereof, the petition for rehearing is denied by the original panel to whom the cases were argued and submitted, and no member of the panel or judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Rule 35, [sic] Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

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## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

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| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff, | : | |
| vs. | : | ORDER |
| | : | CR 76-46(3) |
| BROWNING, INC., BROWNING ARMS COMPANY and JOHN VAL BROWNING, Defendants. | : | |

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[Filed September 14, 1976]

Each of the defendants in this matter filed timely motions to dismiss the indictment which regularly came before the Court for hearing on July 1, 1976, pursuant to notice. At that time, the Government claimed surprise on the grounds that the defendants' motions had not fairly apprised them of the basis for the motions and that the defendants had not filed briefs in the matter. While the Court was of the opinion that the defendants' motions were proper and in conformity with the Federal Rules of Criminal Procedure, and while there is no rule, custom or practice of this Court, nor any Federal Rule of Criminal Procedure which requires that motions to dismiss in criminal cases be supported by memoranda, the Court was of the opinion that it was proper in this case to require briefs on the motions to dismiss and to set the matter for additional arguments after the briefing. It was so ordered.

Pursuant ot the Court's order, the Government, the corporate defendants and the individual defendant, John Val Browning, each filed opening briefs and reply briefs. On August 16, 1976, the matter was again called before the Court pursuant to notice and the Court heard argument by counsel for all parties for in excess of two hours. At the conclusion of the argument, the Court orally granted the motion to dismiss of each of the defendants subject to the entry of a written order directed defendants to prepare a proposed appropriate order within ten days and directed the Government to within ten following days file objections thereto which the Court could take into account in entering its final order.

Having received and considered the proposed order and objections, the Court now considers itself to be fully advised about the law and the bases for defendants' motions to dismiss and is of the opinion that the defendants' motions to dismiss should be granted for the following reasons which include reasons and grounds beyond those mentioned by the Court during oral argument:

The indictment purports to state three counts against each of the three defendants. The defendants are Browning, Inc., Browning Arms Company and John Val Browning. Count I is for an alleged violation of title 18, § 1505 United States Code by counseling, suggesting and advising a Belgium corporation to give false, fraudulent or misleading responses to a Bureau of Customs investigation and inquiry. Count II is a similar charge, but the alleged counsel, suggestions and advice were to a Japan corporation. Count III charges violations of Title 18, § 542, United States Code by 26 separate importations of 22 calibre rifles with false or fraudulent invoices or other documents.

The Court, having considered the cases interpreting Title 18, §§ 1503 and 1505, the legislative history to Title 18,



§ 1510, and the language of each of those sections is of the opinion that the alleged Bureau of Customs investigation and inquiry is not a pending proceeding before a department or agency of the United States and that the word "corruptly", as it appears in the statute, cannot be read so broadly as to make it a crime under 18 U.S.C., § 1505 to counsel, suggest and advise. In so holding, the Court is not persauded by the Government's argument that every Bureau of Customs activity is a proceeding within the meaning of 18 U.S.C., § 1505. The corporate defendants, in their opening memorandum, argue that the term "Proceeding" in 18 U.S.C., § 1505 embraces four elements. The Government concedes three of the elements, but argues that a complaint or charge is not required. All the cases advanced by the Government, however, involved some form of complaint and most involved some form of process or a substitute therefore. The Court is of the opinion that some form of charge, complaint or process is required for there to be a proceeding. *See* Reply Memorandum to Government Response to Corporate Defendants' Motion to Dismiss, Point I, pp. 2-6.

The Court also does not accept the Government's view that "section 1505 is violated by a corrupt act, that is, an act done with an evil or illegal intent." (Government's Brief, page 5). Section 1505 was designed to protect witnesses in proceedings from danger, coercion and intimidation. The statute protects against evil means. The Government is attempting to reach evil mind. The need for strict construction of criminal statutes, the rule of *ejusdem generis*, the doctrine of separation of powers, and the rule of reason dictate against a judicial expansion of Section 1505 to outlaw mere counseling, suggesting and advising, even if the counsel, suggestion and advice may be deemed to be morally reprehensible. *See, United States v. San Martin*, 515 F.2d 317 (5th Cir. 1975); *United States v. Essex*, 407 F.2d 214 (6th Cir. 1969); *Haili v. United States*, 260 F.2d 744 (9th Cir. 1958);

House Report No. 658, U.S. Code Cong. & Admin. News, 1760, 62 (1967). Indeed, the statute must not be construed so broadly as to render it an instrument of harassment by federal investigators. House Report No. 658, *supra.*

The defendants also complain that the whole indictment so confuses the parties that it is unclear which defendant is charged with what conduct. (See Memorandum In Support of Corporate Defendants' Motion to Dismiss Counts I, II, and III of the Indictment, Point III at pp. 11-13). At the first oral argument, the Government said that the confused identifications and inconsistencies make no difference since both companies are charged with a crime. In its brief, the Government characterized the defendants' point as "merely fly-specking" and stated that any confusion as to the parties was the result of the corporate defendants' own disregard of the proper corporate entities. No such disregard is alleged in the indictment. No sufficient support for this "defense" of the indictment by the Government has been demonstrated. The confusion so permeates the indictment as to make it unclear who is alleged to have done what. The indictment does not, therefore, state a crime by either corporation. The confusion also vitiates the indictment's nexus between the alleged conduct of John Val Browning and of the corporate defendants. Thus, the ambiguity, indefiniteness and confusion runs to all the parties and the indictment is defective in all its counts as to all the parties.

The defendants charge that Count III is duplicitous because it alleges, in one count, 26 fraudulent importations of merchandise. The Government does not defend that charge against Count III except to say that the duplicity is merely a pleading error which can be cured by a superseding indictment. Duplicity is not a pleading error; duplicity vitiates the indictment and is an independent ground for its dismissal.



The Government says it intends to return to the Grand Jury in the Eastern District of Missouri to "seek to reindict with twenty-six (26) counts of violations of Title 18, United States Code, Section 542." The defendants charge that the Government is resorting to threats in the way in which it states its intent to seek a twenty-six count indictment. At oral argument, the Government said it was simply stating facts. It seems to the Court that if the Government wanted a twenty-six count indictment, it should have sought such an indictment from the first Grand Jury. If the Government wanted only a one count indictment, it should have sought an indictment only on one alleged fraudulent importation. The Court is of the opinion that such a Government's tactic is inherently coercive of defendants. In the context in which raised the twenty-six count statement stands as a threat, as inappropriate prosecutional conduct and as an additional and independent ground for dismissal.

The individual defendant charges that Counts I and II were duplicitous because in each case the Government alleges several years of fraudulent conduct by the defendants. The Court is of the opinion that, even under the Government's theory of the case, it was certainly unnecessary to allege such conduct or to put before the Grand Jury evidence of such conduct for periods back to 1965. Such evidence of stale matters which were barred by the Statute of Limitations would certainly tend to inflame the Grand Jury and would likewise arouse prejudice at a trial. That duplicity stands as an independent ground of dismissal of Counts I and II.

The individual defendant charges that the Counts I and II of the indictment do not allege violations of 18 U.S.C., § 1505 because each count alleges communications between accomplices which is not a violation of that statute. The Court is of the opinion that the defendant's argument is

well-taken. Cf. *United States v. Cameron*, 460 F.2d 1394, 1401 (5th Cir. 1972).

The corporate defendants charge that each count of the indictment is subject to dismissal because the failure of the Bureau of Customs to follow the statutory procedure mandated by 19 U.S.C., § 1603, which requires a prompt referral to the U.S. Attorney of known violations of the Customs laws which require proceedings by the U.S. Attorney. Title 19, § 1603 is clear and unequivocal in its requirement of a prompt referral both of matters involving seizures and of matters involving violations of the Customs laws. The Bureau of Customs began its investigation and inquiry in 1970 and continued it into 1975. It must have known of some violations at a relatively early date otherwise it would not have continued its investigation. The Court is of the opinion that there is danger in the kind of delay engaged in by the Government in this case. It allows evidence both for and against defendants to become stale or lost. It may permit additional violations to be committed. It permits the Government a kind of selectivity with respect to the grounds it chooses for a prosecution which may be highly prejudicial. It opens itself to harassment. It diminishes the dignity of the Government investigation thereby leading the citizen into non-responsiveness to such investigations. In this case had there been a prompt referral to the U.S. Attorney, the Government would not have had the opportunity to attempt to make a violation of 18 U.S.C., § 1505 out of counseling, suggesting and advising or to attempt to make an "investigation and inquiry" into a "Proceeding". From the face of the indictment, however, it cannot be determined whether or not there was a prompt referral as required by 19 U.S.C., § 1603. But, the Court is of the opinion that if the Government seeks to reindict it may only properly charge as to those matters which were



referred to the U.S. Attorney promptly after becoming known.

The individual defendant requests that the Court prohibit the Government from utilizing the Eastern District of Missouri as its forum, if it seeks to reindict. The pre-ent indictment originated in the Eastern District of Missouri, but the court in that district determined that venue was proper in the District of Utah. The Court is of the opinion that, if it was dissatisfied with the venue determination by the District Court for the Eastern District of Missouri, the Government should have taken the question to the Court of Appeals. It did not do so. It did not object to venue before this Court. Its failure to preserve any venue question amounts to a concession that venue is proper in the District of Utah and the matter may be *res judicata*. The Court is of the opinion that if further Grand Jury proceedings are to be had, they should be in this District.

For the reasons stated herein, IT IS HEREBY ORDERED:

1. The motions to dismiss of each of the defendants are granted.

2. Counts I, II and III of the indictment are hereby dismissed.

DATED this 14th day of September, 1976.

BY THE COURT:

/s/ Willis W. Ritter
Willis W. Ritter
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff, | ) | |
| vs. | ) | CR-76-46 |
| | ) | NOTICE OF |
| BROWNING, INC., | ) | APPEAL |
| BROWNING ARMS COMPANY and | ) | |
| JOHN VAL BROWNING, | ) | |
| Defendants. | ) | |

Come now David W. Harland and David M. Rosen, Special Assistant United States Attorneys for the District of Utah, by and through Ramon M. Child, United States Attorney for the District of Utah, and hereby appeal the Court's Order of August 16, 1976, dismissing the Indictment in the above entitled case.

DATED this 15th day of September, 1976.

DAVID W. HARLAN
DAVID M. ROSEN
Special Assistant United States Attorneys

By /s/ Ramon M. Child
RAMON M. CHILD
United States Attorney



## APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff, | ) | |
| v. | ) | No. |
| | ) | |
| BROWNING, INC., | ) | |
| BROWNING ARMS COMPANY, and | ) | |
| JOHN VAL BROWNING, | ) | |
| Defendants. | ) | |

The Grand Jury charges that at all times material herein:

Introduction

1. Browning, Inc. has been a Utah corporation whose principal business locations have been Morgan, Utah and Arnold, Missouri.

2. The Browning Arms Company, Inc. has been a subsidiary of and controlled by Browning, Inc. The Browning Arms Company, Inc. has been a Utah corporation whose principal business locations have been Morgan, Utah and Arnold, Missouri.

3. Browning, Inc. has been a diversified developer and distributor of sporting goods and hunting and fishing equpment. Its subsidiary Browning Arms Company, Inc. has specialized in the development and marketing of high quality firearms including the Browning .22 semi-automatic, Grade I rifle, the T-Bolt, T-2, .22 caliber rifle and the BL-22, Grade I, .22 caliber rifle.

4. Browning, Inc. prior to 1972 operated under the name Browning Arms Company, Inc. In 1972 the Browning Arms Company name was transferred to its subsidiary.

5. Foreign producers, principally Fabrique Nationale d' Arms de Guerre S.A., of Liege, Belgium (hereinafter FN) and the Miroku Firearms Manufacturing Company of Tokyo, Japan (hereinafter Miroku), have manufactured all Browning firearms imported by the Browning Arms Company and marketed by Browning, Inc.

6. St. Louis, Missouri in the Eastern District of Missouri, has been the port of entry into the United States for all such firearms because of its proximity to the Browning, Inc. warehouse and distribution center at Arnold, Missouri.

7. John Val Browning, has been President and chief executive officer of Browning, Inc. Prior to 1969, John Val Browning was President and chief executive officer of the subsidiary the Browning Arms Company. Subsequently, he has been a director of Browning Arms Company and has acted as an authorized agent of the corporation in its dealings with foreign producers of firearms, particularly FN and Miroku.

Customs Duties

8. United States customs duties are a federal tax upon the value of goods, including firearms, imported into the United States from foreign countries. The United States Customs Service retains custody of the imported goods until the duty is paid. The rate of duty is established by law in the Tariff Schedules of the United States.

9. Customs regulations required a foreign producer sending goods to the United States to complete a "Special Customs Invoice," Form 5515, which includes a statement of the true unit price and value of the imported goods.



10. Customs regulations required domestic importer of foreign goods to complete either a "Customs Consumption Entry," Form 7501, or a "Customs Warehouse Entry," Form 7502 before removing the goods from the custody of the United States Customs Service.

11. Domestic importers completing either Customs Consumption Entry or Customs Warehouse Entry Forms were required to certify that the Special Customs Invoice completed by the foreign producer was true and accurate. If not, the domestic importers were required to truthfully and accurately supplement or amend the Special Customs Invoice.

12. The United States Customs Service determined the amount of customs duty due and owing on imported goods relying upon the description of the goods and their invoice unit price or value as stated on the Special Customs Invoice and the Customs Consumption Entry or the Customs Warehouse Entry Forms.

13. The Tariff Schedules of the United States provided for increased duty rates on .22 caliber rifles with a unit price and value of $25.00 or more.

COUNT I

The .22 Caliber Semi-Automatic, Grade I, Rifle.

1. Beginning prior to January, 1965 and continuing until February, 1973, the Browning Arms Company purchased the Browning .22 caliber semi-automatic rifle, Grade I, from FN, and imported the rifle into the United States.

2. During 1965, the exact date being unknown to the Grand Jury, FN increased the price of the Browning .22 caliber semi-automatic rifle, Grade I, above $25.00 and so informed the Browning Arms Company and John Val Browning.

3. During 1965, the exact date being unknown to the Grand Jury, the Browning Arms Company, through its agent, John Val Browning, and FN agreed to declare the invoice unit price and value of the Browning .22 caliber semi-automatic rifle, Grade I, as $24.95, on the Special Customs Invoice, well knowing that the unit price and value of the rifle exceeded that amount.

4. Further, the Browning Arms Company and its agent John Val Browning agreed to pay FN the balance due on each rifle over and above the $24.95 invoice unit price and value in separate side payments which would not be disclosed to the United States Customs Service and which would be billed to FN as "tooling", "costs of installation", "production premiums" and by such other names as would be used between them.

5. Pursuant to that agreement, between January 1, 1965 and March 16, 1970, the Browning Arms Company imported approximately 57,000, Browning .22 caliber semi-automatic rifles, Grade I, from FN in approximately 115 separate entries wherein the Special Customs Invoice declared the unit price and value of each such rifle as $24.95.

6. As to each of the aforementioned 115 entries, the Browning Arms Company, through its authorized customshouse broker, executed a Customs Warehouse Entry or Customs Consumption Entry form which affirmed the accuracy of the information shown on the Special Customs Invoice, including the invoice unit price and value of $24.95 per rifle, well knowing at the time that said invoice unit price and value was false.

7. Furthermore as to each of the 115 aforementioned entries, the Browning Arms Company, through its authorized customshouse broker declared:



> "I have not received and do not know of any other invoice, paper, letter, document or information showing a different currency price, value, quantity, or description of the said merchandise, and if at any time hereafter I discover any information showing a different set of facts I will immediately make the same known to the Collector of Customs at the port of entry."

Each time that the Browning Arms Company made the foregoing declaration both the Browning Arms Company and John Val Browning knew that it was false and fraudulent when made.

The T-Bolt, T-2, .22 Caliber Rifle

8. Beginning in January, 1965 and continuing until January, 1974, the Browning Arms Company purchased the T-Bolt, T-2 .22 caliber rifle from FN and imported it into the United States.

9. Prior to January 1, 1967, the exact date being unknown to the Grand Jury, FN informed the Browning Arms Company and John Val Browning that on or about January 1, 1967, the price of the T-Bolt, T-2 .22 caliber rifle would be increased above $25.00.

10. On or about January 1, 1967, the Browning Arms Company through its agent, John Val Browning, and FN agreed to declare the unit price and value of the T-Bolt, T-2, .22 caliber rifle as $24.95, on the Special Customs Invoice, well knowing that the unit price and value of the rifle exceeded that amount.

11. Further the Browning Arms Company and John Val Browning agreed to pay FN the balance due on each rifle

over and above the $24.95 invoice unit price and value in separate side payments which would not be disclosed to the United States Customs Serviece and which would be billed to FN as "tooling", "costs of installation", "production premiums" and by such other names as would be used between them.

12. Pursuant to that agreement, between January 1, 1967 and March 16, 1970, the Browning Arms Company imported approximately 7,700 T-Bolt, T-2, .22 caliber rifles from FN in approximately 42 separate entries wherein the Special Customs Invoice declared the unit price and value of each rifle as $24.95.

13. As to each of the aforementioned 42 entries, the Browning Arms Company, through its authorized customshouse broker, executed a Customs Warehouse Entry or Customs Consumption Entry form which affirmed the accuracy of the information shown on the Special Customs Invoice, including the invoice unit price and value of $24.95 per rifle, well knowing at the time that said invoice unit price and value was false.

14. Furthermore, as to each of the 42 aforementioned entries, the Browning Arms Company through its authorized customshouse broker declared:

> "I have not received and do not know of any other invoice, paper, letter, document or information showing a different currency price, value, quantity or description of the said merchandise, and if at any time hereafter I discover any information showing a different set of facts I will immediately make the same known to the Collector of Customs at the port of entry."



Each time that Browning Arms Company made the foregoing declaration, both the Browning Arms Company and John Val Browning knew that it was false and fraudulent when made.

15. All of the foregoing actions by Browning Arms Company and John Val Browning were done to maintain the .22 caliber semi-automatic rifle, Grade I, and the T-Bolt, T-2, .22 caliber rifle in a more favorable customs duty classification than its actual unit price and value warranted. The purpose and effect of this conduct was to lessen the amount of custom duties owing by the Browning Arms Company to the United States, to deprive the United States of customs duties rightfully due and owing in said imported rifles and to keep said rifles competitively priced with other similar rifles in the domestic market.

The Customs Service Investigation

16. Beginning in December, 1970 and continuing until August, 1975, the District Director, St. Louis District, United States Customs Service conducted an investigation into the importation practices of the Browning Arms Company involving the importation of rifles and shotguns from Japan and Belgium through the St. Louis port of entry, within the Eastern District of Missouri.

17. The District Director's investigation has included an inquiry into the accuracy and truthfulness of the declared invoice unit price and value for the Browning .22 caliber semi-automatic rifle, Grade I, and the T-Bolt, T-2, .22 caliber rifle as shown on the aforementioned Special Customs Invoices, and Customs Warehouse Entry or Customs Consumption Entry forms.

18. On or about June 4, 1974,

BROWNING, INC.
THE BROWNING ARMS COMPANY
and JOHN VAL BROWNING

the defendants herein, knowing that within the Eastern District of Missouri the District Director, St. Louis District, United States Customs Service was conducting an investigation and inquiry in said district into the importation practices of the Browning Arms Company and that representatives of the District Director, St. Louis District, United States Customs Service had propounded questions to FN in Belgium with respect to matters material to said investigation and inquiry, did corruptly endeavor to influence, obstruct and impede the due and proper administration of the customs duties laws of the United States under which the United States Customs Service was conducting said investigation and inquiry by counseling, advising and suggesting to FN, and its officers, employees and agents that they give fraudulent, misleading, incomplete and manufactured answers to the United States Customs Service, St. Louis District within the Eastern District of Missouri, concerning a matter material to the investigation and inquiry. The said corrupt endeavor included, but is not limited to, the following:

(a) On March 25, 1974, William Rudman, United States Customs Representative met with Henri Heidebroek, Chef de Service, FN in Belgium. Rudman, at the request of the St. Louis District, United States Customs Service, propounded certain questions to FN concerning the .22 caliber semi-automatic rifle and the T-Bolt, .22 caliber rifle imported by the Browning Arms Company into the United States.

(b) On March 27, 1974, Henri Heidebroek communicated



the substance of Rudman's inquiries to Browning, Inc., the Browning Arms Company and John Val Browning.

(c) On June 4, 1974, John Val Browning personally and as agent for Browning, Inc. and the Browning Arms Company telephoned FN and counseled, advised and suggested that FN and its officers, employees and agents conceal from the United States Customs Service the existence of the side payments made by the Browning Arms Company to FN for the Browning .22 caliber semi-automatic rifle, Grade I, and the T-Bolt, T-2, .22 caliber rifle and give fraudulent, misleading, incomplete and manufactured answers to the inquiries of the United States Customs Service representative.

(d) On June 4, 1974, John Val Browning personally and as agent for Browning, Inc. and the Browning Arms Company, sent a telex to M. Vandestrick and J. van der Rest of FN wherein he counseled, advised and suggested that FN, its officers, employees and agents give fraudulent, misleading, incomplete and manufactured answers to the inquiries of the United States Customs Service representatives.

(e) The aforementioned conduct had the purpose of concealing from the United States Customs Service, St. Louis District, the existence of side payments to FN for the Browning .22 caliber semi-automatic rifle, Grade I, and the T-Bolt, T-2, .22 caliber rifle and of concealing the actual unit price and value of the aforementioned rifles.

In violation of § 1505, Title 18, United States Code.

## COUNT II

The Grand Jury further charges:

1. Beginning in March 1969 and continuing until June 12, 1974 the Browning Arms Company purchased the Browning BL-22, Grade I, .22 caliber rifle from Miroku and imported the rifle into the United States.

2. Between January 1969 and October 1969, the exact date being unknown to the Grand Jury, the Browning Arms Company through its agent John Val Browning and Miroku agreed that on or about October 8, 1969, Miroku would increase the unit price of the Browning BL-22, Grade I, .22 caliber rifle above $25.00.

3. Between January 1, 1969 and October 8, 1969, the exact date being unknown to the Grand Jury, the Browning Arms Company through its agent John Val Browning and Miroku agreed to declare on the Special Customs Invoice the unit price and value of the Browning BL-22, Grade I, .22 caliber rifle as $24.90, well knowing that the unit price and value of the rifle exceeded that amount.

4. Between January 1, 1971 and October 25, 1971, the exact date being unknown to the Grand Jury, the Browning Arms Company through its agent John Val Browning and Miroku agreed that on or about November 1, 1971 Miroku would increase the unit price of the Browning BL-22, Grade I, .22 caliber rifle by an additional eight percent (8%).

5. On or about October 25, 1971 the Browning Arms Company through its agent John Val Browning and Miroku reaffirmed their previous agreement and again agreed to declare on the Special Customs Invoice the unit price and value of the Browning BL-22, Grade I, .22 caliber rifle as



$24.90, well knowing that the unit price and value of the rifle exceeded that amount.

6. Further, as to each of the aforementioned agreements, the Browning Arms Company and its agent John Val Browning agreed to pay Miroku the balance due on each rifle over and above the $24.90 invoice unit price and value in separate side payments which would not be disclosed to the United States Customs Service and which would be billed to Miroku as "tooling" and by such other names as would be used between them.

7. Pursuant to those agreements between October 8, 1969 and November 15, 1972 the Browning Arms Company imported approximately 47,000 Browning BL-22, Grade I, .22 caliber rifles from Miroku in approximately 42 separate entries wherein the Special Customs Invoice declared the invoice unit price and value of each rifle as $24.90.

8. As to each of the aforementioned 42 entries, the Browning Arms Company, through its authorized customshouse broker, executed Customs Warehouse Entry or Customs Consumption Entry form which affirmed the accuracy of the information shown on the Special Customs Invoice, including the invoice unit price and value of $24.90 per rifle well knowing at the time that said invoice unit price and value was false.

9. Furthermore as to each of the 42 aforementioned entries, the Browning Arms Company through its authorized customshouse broker declared:

> "I have not received and do not know of any other invoice, paper, letter, document or information showing a different currency price, value, quantity or description of the said merchandise,

and if at any time hereafter I discover any information showing a different set of facts I will immediately make the same known to the Collector of Customs at the port of entry."

Each time that the Browning Arms Company made the foregoing declaration both the Browning Arms Company and John Val Browning knew that it was false and fraudulent when made.

Customs Service Investigation

10. Beginning in December 1970 and continuing until August 1975, the District Director, St. Louis District, United States Customs Service conducted an investigation into the importation practices of the Browning Arms Company involving the importation of rifles from Japan and Belgium through the St. Louis port of entry within the Eastern District of Missouri.

11. The District Director's investigation has included an inquiry into the accuracy and truthfulness of the declared invoice unit price and value for the Browning BL-22, Grade I, .22 caliber rifle as shown on the aforementioned Special Customs Invoices and Customs Warehouse Entry or Customs Consumption Entry forms.

12. Between on or about March 31, 1971 and April 15, 1971,

BROWNING, INC.
THE BROWNING ARMS COMPANY
and JOHN VAL BROWNING

the defendants herein, knowing that within the Eastern District of Missouri, the District Director, St. Louis District, United States Customs Service was conducting an investiga-



tion and inquiry in said district into the importation practices of the Browning Arms Company and that representatives of the District Director, St. Louis District, United States Customs Service had requested information from Browning, Inc. and the Browning Arms Company with respect to matters material to said investigation and inquiry, did corruptly endeavor to and did corruptly influence, obstruct and impede the due and proper administration of the customs duties laws of the United States under which the United States Customs Service was conducting said investigation and inquiry by counseling, advising and suggesting to Miroku and by causing Miroku and its officers, employees and agents to give false, fraudulent, misleading, incomplete and manufactured information to the United States Customs Service, St. Louis District within the Eastern District of Missouri, concerning a matter material to the investigation and inquiry. The said corrupt conduct included, but is not limited to, the following:

a. On February 11, 1971, Frank J. Regan, Supervisory Import Specialist, St. Louis District, United States Customs Service wrote a letter to Browning, Inc., then known as the Browning Arms Company, requesting "price list information pertaining to unit prices" for assembled firearms imported by the company.

b. On March 31, 1971, John Val Browning personally and as an officer of the company, wrote Miroku and counseled, advised and suggested that Miroku and its officers, agents and employees give false, fraudulent, misleading, incomplete and manufactured information to the United States Customs Service, St. Louis, Missouri, concerning the unit price and value of the Browning BL-22, Grade I, .22 caliber rifle.

c. On or about April 15, 1971, John Val Browning personally and as an officer of the company, caused Miroku

to give false, fraudulent, misleading, incomplete and manufactured information to the United States Customs Service concerning the unit price and value of the Browning BL-22, Grade I, .22 caliber rifle.

d. The aforementioned conduct had the purpose and affect of concealing from the United States Customs Service, St. Louis District, the existence of side payments to Miroku for the Browning BL-22, Grade I, .22 caliber rifle and of concealing the actual unit price and value of the aforementioned rifle.

In violation of § 1505, Title 18, United States Code.

## COUNT III

The Grand Jury further charges that:

On or about the dates hereinafter specified, in the Eastern District of Missouri,

BROWNING, INC.
THE BROWNING ARMS COMPANY
and JOHN VAL BROWNING,

the defendants herein, willfully and knowingly did enter and introduce and attempt to enter and introduce into the commerce of the United States, imported merchandise, that is, Browning BL-22, Grade I, .22 caliber rifles by means of false statements, false and fraudulent invoices, declarations, affidavits and certain other papers, to wit, Customs Warehouse Entries and Customs Consumption Entries, the said statements, invoices, declaration, affidavits and papers being hereinafter described by "Entry Number" and "Date of Entry," which said documents were false and fraudulent in that they did reflect as the invoice unit price and value of said merchandise a price and value which was less than



the actual unit price or value of said merchandise, as the defendants then knew.

| Entry Number | Date of Entry |
|---|---|
| 105729 | April 15, 1971 |
| 106190 | May 11, 1971 |
| 106350 | May 19, 1971 |
| 106387 | May 20, 1971 |
| 106906 | June 16, 1971 |
| 100851 | August 24, 1971 |
| 101308 | September 22, 1971 |
| 101538 | October 5, 1971 |
| 102219 | November 15, 1971 |
| 102299 | November 18, 1971 |
| 102300 | November 18, 1971 |
| 102430 | November 29, 1971 |
| 105088 | April 5, 1972 |
| 105167 | April 7, 1972 |
| 105461 | April 24, 1972 |
| 105591 | April 27, 1972 |
| 105932 | May 15, 1972 |
| 106589 | June 19, 1972 |
| 106694 | June 23, 1972 |
| 100102 | July 10, 1972 |
| 100738 | August 9, 1972 |
| 100886 | August 16, 1972 |
| 101329 | September 12, 1972 |
| 102048 | October 25, 1972 |
| 102159 | November 1, 1972 |
| 102426 | November 15, 1972 |

In violation of Section 542, Title 18, United States Code.

A True Bill.

DONALD J. STOHR
United States Attorney

_____
FOREMAN

_____
DAVID W. HARLAN
Assistant United States Attorney

_____
DAVID M. ROSEN
Assistant United States Attorney

No. 77-1576

# In the Supreme Court of the United States

OCTOBER TERM, 1978

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JOHN VAL BROWNING, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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WADE H. MCCREE, JR.,
*Solicitor General,*

PHILIP B. HEYMANN,
*Assistant Attorney General,*

JEROME M. FEIT,
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## INDEX



## CITATIONS

Cases:

# In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1576

JOHN VAL BROWNING, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 572 F. 2d 720. The opinion and order of the district court (Pet. App. 19a-25a) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on March 14, 1978. A petition for rehearing was

denied on April 5, 1978. The petition for a writ of certiorari was filed on May 4, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether an investigation by the Customs Service into the importation practices of petitioner's company was a "proceeding" within the meaning of 18 U.S.C. 1505.

2. Whether communications between accomplices may violate 18 U.S.C. 1505.

3. Whether the court of appeals lacked jurisdiction to consider the government's appeal.

## STATEMENT

In March 1976, a grand jury in the Eastern District of Missouri returned a three-court indictment (Pet. App. 27a-42a) charging petitioner, and defendants Browning Arms Company and Browning, Inc., with corruptly endeavoring to influence, obstruct, and impede the administration of customs laws, in violation of 18 U.S.C. 1505 (Counts I and II), and with introducing imported merchandise into the commerce of the United States by means of false statements and invoices, in violation of 18 U.S.C. 542 (Count III). Shortly thereafter, the case was transferred to the District of Utah. On August 16, 1976, the United States District Court for the District of Utah entered an oral order dismissing the indictment; on September 14, 1976, it issued a written order to



the same effect (Pet. App. 19a-25a). The government appealed, and the court of appeals reversed and reinstated the indictment (Pet. App. 1a-14a).

The indictment described the relationship between the Browning Arms Company and two foreign manufacturing companies, Fabrique Nationale d'Armes de Guerre S.A., of Liege, Belgium (FN), and Miroku Firearms Manufacturing Company of Tokyo, Japan, both sellers of weapons to Browning Arms. It alleged that petitioner persuaded both FN and Miroku to falsify the unit price of certain .22 caliber rifles on Special Customs Invoices in order to avoid the higher duties imposed on such rifles with a unit price and value of $25.00 or more.[1] FN and Miroku agreed to list the unit price of the rifles sold to Browning Arms at an amount just below $25.00. Browning Arms then paid its suppliers the difference between the price listed on the Customs Invoice and the actual price of the rifles. These separate payments were not disclosed to the Customs Service. Under these arrangements, Browning Arms imported approximately 64,700 rifles from FN in approximately 157 separate entries between 1965 and 1970; the company imported approximately 47,000 rifles from Miroku in approximately 42 separate entries between 1969 and 1972 (Pet. App. 37a).

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[1] Petitioner was president and chief executive officer of Browning Arms Company, Inc. In 1972, the company changed its name to Browning, Inc., and transferred the name Browning Arms Company to a subsidiary. Petitioner became president and chief executive officer of Browning, Inc., and also served as a director of Browning Arms (Pet. App. 28a).

During the period 1970-1975, the United States Customs Service conducted an investigation of the importation practices of Browning Arms Company. Count I of the indictment alleged that in the course of this investigation petitioner counselled FN to conceal the undisclosed payments and to give misleading, incomplete, and manufactured information in response to Customs Service inquiries. Count II alleged that petitioner had engaged in similar conduct with respect to Miroku. Finally, Count III charged petitioner and his corporate co-defendants with 26 separate instances of willfully introducing imported merchandise into the United States by means of false and fraudulent documents. This charge was based on the Customs entry forms executed by Browning Arms Company in connection with each shipment of .22 caliber rifles from FN or Miroku. The entry forms falsely affirmed the accuracy of the Special Customs Invoices filed by the weapons suppliers.

**ARGUMENT**

1. Even if petitioner's claim would otherwise merit review, this Court should not now consider his challenges to the court of appeals' reinstatement of the indictment. The ruling below places petitioner in precisely the same procedural position he would have occupied if the district court had denied his motion to dismiss. Such a denial would not have been subject to pretrial appeal. See *Cogen* v. *United States*, 278 U.S. 221; *Cobbledick* v. *United States*, 309 U.S.



323; *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327. The same considerations that counsel against interlocutory appeals of denials of motions to dismiss weigh against interlocutory review by this Court of the issues now presented by petitioner. Petitioner was indicted more than two years ago and has not yet been tried. At trial, petitioner may be acquitted, in which event his claim will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed, he will then be able to present all his contentions to this Court when seeking review of the final judgment.

2. Petitioner contends (Pet. 12-18) that his advice to foreign manufacturers to give false and misleading information to customs officials did not violate 18 U.S.C. 1505, because the customs investigation in this case was not a "proceeding" pending before a government agency, as required by Section 1505. As the court of appeals correctly held (Pet. App. 5a-10a), this claim is without merit.

Section 1505 prohibits the conduct of persons who "corruptly * * * endeavor[] to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States * * *." The statute also provides for punishment of those who corruptly endeavor "to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States

* * *." Petitioner argues that because no formal event, such as the filing of a complaint or the issuance of a subpoena, marked the beginning of the customs investigation in this case, that investigation was not a "proceeding" within the meaning of Section 1505.

After a review of the relevant authorities, the court of appeals properly concluded (Pet. App. 9a) that

> the term "proceeding" is not * * * limited to something in the nature of a trial. The growth and expansion of agency activities have resulted in a meaning being given to "proceeding" which is much more inclusive and which no longer limits itself to formal activities in a court of law. Rather, the investigation or search for the true facts such as that which is described in the indictment here is not to be ruled as a nonproceeding simply because it is preliminary to indictment and trial.

This construction of the statute fully accords with the results reached by other federal courts, and further review by this Court is not warranted. In *United States* v. *Fruchtman*, 421 F. 2d 1019, 1021 (C.A. 6), certiorari denied, 400 U.S. 849, for example, the court of appeals held that " 'proceeding' is a term of broad scope, encompassing both the investigative and adjudicative functions of a department or agency." Likewise, in *Rice* v. *United States*, 356 F. 2d 709, 712 (C.A. 8), the court of appeals construed the term "proceeding" as used in Section 1505 to mean simply



"proceeding in the manner and form prescribed for conducting business before the department or agency, including all steps and stages in such an action from its inception to its conclusion." In the Eighth Circuit's view, as in the opinion of the court of appeals in this case, "Congress did not limit the term 'proceeding' as used in § 1505 to only those acts committed after a formal stage was reached * * *" (356 F. 2d at 712). See also *United States* v. *Vixie*, 532 F. 2d 1277 (C.A. 9); *United States* v. *Batten*, 226 F. Supp. 492 (D. D.C.), certiorari denied, 380 U.S. 912.

Notwithstanding these precedents,[2] petitioner argues that the passage of 18 U.S.C. 1510 in 1967 re-

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[2] Petitioner attempts to distinguish *Fruchtman* and *Rice* on the ground that in *Fruchtman* a formal complaint had been filed with the Federal Trade Commission, and in *Rice* preliminary charges had been filed with the National Labor Relations Board at the time of the alleged violations of Section 1505. The court of appeals' opinion in *Fruchtman*, however, makes no mention of the filing of a complaint and refers only to an informal investigation by the Commission. Petitioner accurately observes that informal charges had been filed with the Board at the time of the alleged Section 1505 violations at issue in *Rice*. Indeed, the basis for the criminal charges against the defendants in that case was that they had used force and threats of force in order to compel certain union members to withdraw the charges they had filed. But the fact remains that the court stressed that the lack of a formal complaint by the Board's general counsel was not dispositive because the term "proceeding" should be interpreted broadly according to its dictionary definition and its usage in common parlance.

Under the statutory scheme relevant here, persons importing merchandise from abroad must file sworn Customs Entry

flects a congressional determination that agency action not instituted by formal process, such as the customs investigation here in dispute, is not covered by the term "proceeding" in Section 1505. Section 1510 makes criminal any willful endeavor "by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator." Petitioner contends that only Section 1510 applies to investigations occurring before the initiation of formal proceedings and that the conduct alleged here was not criminal because he did not seek "by means of bribery, misrepresentation, intimidation, or force or threats thereof" to influence the statements of the foreign weapons suppliers.[3]

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forms attesting to the accuracy of the description and price of the goods as stated in the shipping invoice. See 19 U.S.C. 1485. Customs officials, usually relying in large measure on the information provided in the invoices and entry forms, then appraise the imported merchandise (see 19 U.S.C. 1500) and collect the duty owed (see 19 U.S.C. 1505). In 1970, Congress amended the statutory provisions governing the appraisal and collection process. These amendments are contained in Title II of the Customs Administrative Act of 1970, 84 Stat. 282-283, and Title II is labelled "Administrative Proceedings in Customs Matters." As a matter of both common usage and legislative characterization, therefore, the Customs Service's collection efforts, including the attendant investigations into the accuracy of values and prices reported by importers and suppliers, are properly termed "proceedings."

[3] By contrast to Section 1510, Section 1505 punishes any person who "*corruptly* * * * endeavors to influence, obstruct,



Petitioner misconceives the purpose of Section 1510. In enacting that provision, Congress addressed itself solely to problems encountered in criminal investigations that have not yet ripened into judicial proceedings. Section 1503 and the first paragraph of Section 1505 impose criminal penalties on persons who corruptly endeavor to influence witnesses in judicial, administrative, or congressional proceedings. Before the passage of Section 1510, attempts to obstruct criminal investigations by threatening potential witnesses into silence before the initiation of a judicial proceeding escaped criminal sanction. The difficulties were especially acute in the area of organized crime and racketeering. Congress therefore enacted Section 1510 in order to provide protection for witnesses who cooperate with federal law enforcement officials before a prosecution is formally commenced. See S. Rep. No. 307, 90th Cong., 1st Sess. 1-4, 6 (1967); H.R. Rep. No. 658, 90th Cong., 1st Sess. 1-3 (1967).

As the court of appeals correctly concluded (Pet. App. 7a), this legislative history "does not serve to give any significant clarification to the meaning of 'proceeding' " in the fourth paragraph of Section 1505, which petitioner allegedly violated. The federal courts have consistently construed the term "proceeding" to

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or impede the due and proper administration of the law" in an agency proceeding (emphasis added). The court of appeals correctly rejected petitioner's argument that his alleged behavior did not constitute a "corrupt" effort to obstruct the due and proper administration of the law (Pet. App. 10a), and petitioner does not pursue that argument here.

include the civil investigative activities of federal agencies, whether or not initiated by formal process. In the absence of evidence that Congress intended to define the word more restrictively, courts may properly refer to common usage and dictionary definitions in determining the meaning of "proceeding" in Section 1505. By embracing civil investigations of the kind involved here, the interpretation adopted by the court of appeals and other federal courts serves to advance the purpose of the statute. "In light of the scope of the congressional purpose," the statute should not be given "an unnaturally narrow reading * * *." *United States* v. *Nardello*, 393 U.S. 286, 296.

3. Relying on *United States* v. *Cameron*, 460 F. 2d 1394 (C.A. 5), petitioner claims (Pet. 18-19) that his indictment was properly dismissed, because a person cannot violate Section 1505 by communicating with an alleged accomplice and urging that person to withhold information from law enforcement officials. *Cameron* is inapposite.

*Cameron* involved a prosecution under Section 1510. The defendant, an attorney, received as a retainer money he knew had been stolen in a bank robbery. The mother of one of the participants in the robbery gave the money to an associate in the defendant's legal practice in an effort to obtain representation for her son. The associate forwarded the money to the defendant and then cooperated in the defendant's efforts to conceal the location of the money from federal investigators. The poorly drawn second count of a



two-count indictment charged defendant with an offense under Section 1510.[4] The government alleged that defendant and his legal associate had endeavored, by means of a misrepresentation, to cause the associate to make false statements to an agent of the Federal Bureau of Investigation (see 460 F. 2d at 1396 n. 3). As the court of appeals recognized (*id.* at 1401-1402), this charge was faulty, reciting as it did that both defendant and his associate sought to prevent the associate from making truthful statements to the FBI. Rejecting the possibility that the associate could have been his own victim, the court of appeals reversed. The court noted that the only apparent misrepresentation was the one the associate had made to the FBI; the government produced no evidence that the associate had been induced to provide false information through a misrepresentation made to him by the defendant (*id.* at 1402).

Here, by contrast, petitioner was indicted under Section 1505 rather than Section 1510. As the legislative history recounted above demonstrates, Section 1510 deals solely with efforts to obstruct the communications of information to criminal investigators by potential witnesses. Section 1505, on the other hand, proscribes not only corrupt efforts to influence a witness in an agency proceeding but also all corrupt attempts to obstruct the due and proper administra-

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[4] The first count of the indictment charged the defendant with violating 18 U.S.C. 2113(c) by receiving and concealing money, knowing the same to have been unlawfully taken from a bank.

tion of the law in such a proceeding. Accordingly, even had FN and Miroku been named as co-defendants or unindicted accomplices, petitioner's conduct in counselling them to give fraudulent answers to Customs Service officials would have violated Section 1505. See *Stein* v. *United States*, 337 F. 2d 14 (C.A. 9), certiorari denied, 380 U.S. 907; *United States* v. *Abrams*, 427 F. 2d 86 (C.A. 2), certiorari denied, 400 U.S. 832. Moreover, unlike the defendant's legal associate in *Cameron*, FN and Miroku were *not* named as accomplices in the indictment, and therefore the charges against petitioner could not have involved any of the logical problems discerned by the *Cameron* court.

4. Finally petitioner asserts (Pet. 19-21) that the court of appeals lacked jurisdiction to consider the government's appeal because the appeal was not taken from a final order in the district court. This argument is groundless.

The district court orally granted defendants' motions to dismiss on August 16, 1976 (II Tr. 53).[5] Counsel for the defendant corporations requested time to prepare a proposed written order that would clearly state the grounds for the dismissal. The district court granted defense counsel ten days in which to submit such a proposal and government counsel ten days following the submission to file objections (II Tr. 54-55).

[5] "II Tr." refers to Volume II of the transcript of the district court proceedings, dated August 16, 1976.



Later the same day, a docket entry was made stating that the motions to dismiss had been granted as to each defendant and that motions for discovery and for a bill of particulars had been rendered moot by the court's ruling.[6] The docket entry also stated the time limits within which counsel were to submit a proposed written order and objections thereto. Thereafter, on September 14, 1976, the district court entered a written order dismissing the indictment; notice of this order was mailed on September 16, and received by the government on September 20. Notice was thus mailed and received more than 30 days after the August 16 oral order granting the defense motions to dismiss the indictment (Government's Reply to Appellees' Motion to Dismiss, Appendix 1).

On September 15, in order to preserve the government's right to appeal, government counsel filed a notice of appeal from the August 16 order. The government did not file an additional notice of appeal after receiving the district court's September 14 order. However, on September 27, the government filed with the district court a designation of the record on appeal which included reference to the court's written order of September 14 (Government's Reply to Ap-

[6] Rule 4(b), Fed. R. App. P., provides in pertinent part:

> * * * When an appeal by the government [in a criminal case] is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment order appealed from. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket.

pellees' Motion to Dismiss, Appendix 2). In addition, the government filed with the court of appeals a docketing statement which indicated that the government was appealing from the district court's September 14 order (Government's Reply to Appellees' Motion to Dismiss, Appendix 3).

In light of these facts, it would exalt form over substance to hold that the court of appeals lacked jurisdiction simply because the government, in its September 15 notice of appeal, stated that it was appealing the district court's order of August 16 rather than the written order of September 14. This Court consistently has held that defects of such a technical nature should be disregarded. *Hoiness* v. *United States*, 335 U.S. 297, 300; see also *Foman* v. *Davis*, 371 U.S. 178; *Lemke* v. *United States*, 346 U.S. 325. The government's notice of appeal in the instant case, the designation of the record, and the docketing statement clearly disclosed to the court of appeals and to the parties involved the government's intention to appeal the dismissal of the indictment. This was sufficient to perfect an appeal in the circumstances presented.[7] See, *e.g.*, *Daily Mirror, Inc.* v. *New York News, Inc.*, 533 F. 2d 53 (C.A. 2); *Jones* v. *Nelson*, 484 F. 2d 1165 (C.A. 10); *Jones* v. *Chaney and James Construction Co.*, 399 F. 2d 84 (C.A. 5).

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[7] The cases cited by petitioner (Pet. 20) do not support his position. In those cases, either *no* appeal was taken within the jurisdictional time limit, or the appeal was taken from an order clearly interlocutory in nature.



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 77-1578

# Supreme Court of the United States

OCTOBER TERM, 1978

JOHN VAL BROWNING,
*Petitioner,*

v.

UNITED STATES OF AMERICA

## PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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IN THE

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OCTOBER TERM, 1978

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v.

UNITED STATES OF AMERICA

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## PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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The Brief in Opposition of the United States deserves a few brief comments by the petitioner.

1. In describing the indictment, the respondent asserts that the indictment alleged that "petitioner persuaded both FN and Miroku to falsify" invoice prices in Customs declarations. But the indictment does not use the word "persuaded." It does allege an endeavor to obstruct the administration of the laws by "counseling, advising and suggesting." (Pet. App. 34a). But it does not charge "persuaded."

2. In discussing petitioner's argument relating to accomplices at pp. 10-12 of the Brief in Opposition, the respondent asserts that the case is different from *United States v. Cameron*, 460 F.2d 1394 (C.A. 5), because here "FN and Miroku were not named as accomplices in the indictment, and therefore the charges against petitioner could not have involved any of the logical problems discerned by the *Cameron* court." (Br. in Opp., p. 12).

To the contrary, this indictment alleges that both FN and Miroku, when they raised certain gun prices above $25.00, would bill separately for such increases while still declaring the unit price and value on the Special Customs Invoice to be below $25.00, "well knowing that the unit price and value . . . exceeded that amount." (Count I, paras. 3 and 10 and Count II, paras. 3 and 5.) It is abundantly clear from the indictment that the alleged obstruction of justice in Counts I and II assertedly lies in communications between Browning and officials of Fabrique Nationale (Count I) and Miroku (Count II), all of whom are alleged by intendment and legal effect to be accomplices in communicating false or misleading information to Customs.

3. In our petition for certiorari, we argued that although two courts of appeals, in *United States v. Fruchtman* (C.A. 6), 421 F.2d 1019, and *United States v. Rice* (C.A. 8), 356 F.2d 709, had used broad language holding that 18 U.S.C. 1505 applied to both the investigative and adjudicative function of a department or agency, the facts in those cases showed there was present in each the formality which would initiate a "proceeding." (Pet., p. 13).

The Brief in Opposition agrees with this observation as to *Rice*, but argues that the "court of appeals opinion in *Fruchtman*, however, makes no mention of the filing of a complaint and refers only to an informal investigation by the Commission." (Br. in Opp., page 7, fn. 2).



It is true that the court of appeals opinion makes no mention of the fact, but the government's brief in that case (No. 19348) states the following:

> Page 16:
> "The Court below found the following characteristics of Smeraldi's investigation to be relevant to its holding that it was a 'proceeding' protected by the criminal sanctions of 18 U.S.C. §1505:
>
> 'In accordance with the Rules of Practice, the Federal Trade Commission 16 C.F.R. Supp. Sec. 1.1 *et seq.*, the *McLouth* investigation of alleged discriminatory pricing practices of cold rolled steel was initiated upon the filing of an undisclosed complaint.'"
>
> Page 23:
> "The only relevance this section [18 U.S.C.A. §1510] would have to agency proceedings would be if the obstruction occurred by means of intimidating a *complaining witness* before he had made his complaint to the agency in a criminal matter. Once the complaint has been made, the obstruction is then of an agency proceeding and §1505 has been construed to apply." (bracketed materials added)

Therefore, according to the government's own brief in the court of appeals in *Fruchtman*, a complaint had been filed in the matter, initiating a "proceeding."

In this case there was, of course, no element of any formality initiating a "proceeding." There was simply an investigation which, we submit, is not embraced within the ambit of 18 U.S.C. 1505.

Respectfully submitted,

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